UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES,	)	
	)	
Plaintiff	)	
	)	
v.	)	**CRIM. NO. 00-06-P-C**
	)	
FRANKLYN R. NELSON,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S 28 U.S.C. § 2255 MOTION

Franklyn R. Nelson, who is serving a 180-month sentence following his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g)(1), has moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. I recommend that the court **DENY** his motion.

BACKGROUND

The United States charged Nelson with possession of a firearm by a prohibited person, 18 U.S.C. § 922(g)(1), seeking the fifteen-year mandatory minimum sentence provided for in 18 U.S.C. § 924(e)(1). The firearm in question was stolen from a residence in Bangor, Maine and was manufactured outside the State of Maine. Nelson had a prior criminal history that included a 1991 state proceeding that resulted in convictions on two counts of gross sexual assault and two counts of gross sexual misconduct. At his Rule 11 Proceeding Nelson entered a plea of guilty to the § 922(g)(1) offense and acknowledged that the government would be able to prove every element of the § 922(g)(1) charge. However, he contested the application of § 924(e)'s 15-year

mandatory minimum sentence. The Court noted that that issue would be reserved for the sentencing hearing. (Feb. 29, 2000 Rule 11 Proceeding Tr., Docket No. 24, at 21.)

The Court conducted a sentencing hearing on June 6, 2000. At the conclusion of the hearing, the Court sentenced Nelson under § 924(e)(1) to the mandatory minimum fifteen-year term of imprisonment. (Docket No. 18). Nelson immediately filed a notice of appeal. (Docket No. 19). On December 14, 2000, Nelson voluntarily withdrew his appeal. (Docket No. 21). Approximately six months later, Nelson filed the instant motion.

Nelson raises four separate grounds in his motion: (1) that the Interstate Commerce Clause does not authorize the federal government's "exercise of jurisdiction" in his firearm case; (2) that his status as an armed career criminal was improperly based upon uncounseled and unconstitutional prior state convictions and that the 1991 judgment of conviction on four counts was improperly counted as four convictions; (3) that the grand jury that returned the indictment was improperly impaneled; and (4) that his counsel was ineffective because he failed to raise these grounds and failed to inform Nelson of these grounds for an appeal. (Defendant's § 2255 Motion, Docket No. 22, at 56.) Because the sole basis for Nelson's contention that the grand jury was improperly impaneled is his interstate commerce argument, I address arguments (1) and (3) in tandem.

DISCUSSION

Pursuant to the federal firearms law, it is unlawful for a felon[1] to "possess in or affecting interstate . . . commerce[] any firearm or ammunition[] or to receive any firearm or ammunition [that] has been shipped or transported in interstate . . . commerce." 18 U.S.C. § 922(g). In the event that a felon so possesses or receives a firearm or ammunition and has three previous state

[1] The statute describes "any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

or federal convictions for a violent felony or a serious drug offense, or both, his conviction under § 922(g) will carry a mandatory minimum fifteen-year sentence. Id. § 924(e)(1). The prior convictions must relate to criminal acts "committed on occasions different from one another." Id.

1. The Interstate Commerce Clause and 18 U.S.C. § 922(g)

Nelson asserts that "[t]he interstate commerce statute [sic] doesn't apply to firearms." He argues that merely having a gun, even one that has been manufactured outside the state, does not "affect" interstate commerce and, therefore, § 922(g) cannot be applied to the facts of his case.

Clearly established precedent recognizes that possession of a firearm that had previously traveled in interstate commerce is sufficient to establish a federal statute's "in commerce or affecting commerce" nexus requirement. See Scarborough v. United States, 431 U.S. 563 (1977) (interpreting predecessor statute). The First Circuit has ruled that constitutional challenges to the validity of § 922(g) are "hopeless on . . . the law." United States v. Blais, 98 F.3d 647, 649 (1st Cir. 1996). Blais not only rejected a facial challenge to § 922(g)'s constitutionality, but also affirmed that the required showing of a minimal nexus with interstate commerce can be met with the sole evidence of the out-of-state manufacture of the gun. Id. at 650.

Nothing in more recent Supreme Court rulings concerning the boundaries of congressional power under the Commerce Clause, including United States v. Lopez, 514 U.S. 549 (1995), United States v. Morrison, 529 U.S. 598 (2000), and Jones v. United States, 529 U.S. 848 (2000), casts any doubt upon the continued vitality of Blais and its interpretation of § 922(g). In fact, Blais post-dates Lopez and discusses the implications of the Lopez rationale. Every circuit, which has addressed the question of the continuing constitutionality of § 922(g) after Lopez, Morrison, and Jones, has concluded that the Supreme Court's analysis of the

predecessor statute in Scarborough remains good law. See United States v. Torres, Crim. No. 00-302, 2001 WL 793282, *2 (E.D. Pa. July 13, 2001) (collecting cases). Nelson's arguments concerning the constitutionality of his conviction and the impanelment of the jury are baseless.

2. Prior State Convictions and Armed Career Criminal Status

Nelson seeks to be relieved of the 15-year mandatory minimum sentence (1) because neither his counsel nor the judge in his 1991 state court proceeding informed him of his right to appeal or of certain collateral consequences of his convictions, including disenfranchisement, inability to serve as a juror, and the possibility that these convictions might serve as "strikes" against him in the career criminal context and (2) because his convictions on the four sex crimes should collectively constitute only one conviction.[2]

To begin, pursuant to Daniels v. United States, 121 S. Ct. 1578 (2001), Nelson does not have the right to collaterally attack his prior convictions in the context of a § 2255 motion unless his challenge is premised on the fact that he was denied counsel (as distinct from a challenge based on ineffective assistance of counsel). Id. at 1583 & n.1. Because Nelson complains of his counsel's performance in this prior proceeding, it is clear that he was, in fact, counseled.

With regard to the remaining issue of whether his 1991 conviction on two counts of gross sexual assault and two counts of gross sexual misconduct was properly treated as four separate convictions, Nelson argues that, in fact, his sexual abuse of his daughter was not marked by large reprieves, but occurred on a daily basis over an extended period of time. (Movant's Response, Docket No. 27, at 2-3.) Nelson's admission to daily acts of sexual assault cannot provide him any relief. It matters little whether the government's description of criminal conduct separated by several months or Nelson's version of daily acts are truth. In either scenario, the crimes of which Nelson was convicted concern distinct acts of abuse that were episodic in nature. See

[2] Nelson first raises this argument in his reply to the government's response.

United States v. Harris, 964 F.2d 1234, 1237 (1st Cir. 1992) (holding that two assault and battery convictions involving the same victim but occurring two months apart were properly treated as two convictions for purposes of § 924(e) even though defendant pleaded guilty to both, and was convicted and sentenced for both, on the same day); United States v. Gillies, 851 F.2d 492, 497 (1st Cir. 1988) (holding that two armed robbery convictions involving different stores on consecutive days were properly counted as two convictions for purposes of § 924(e) even though defendant received concurrent sentences); United States v. Hayes, 951 F.2d 707, 709 (6th Cir. 1991) (holding that convictions need not be separately adjudicated to support a § 924(e)(1) enhancement so long as they do not involve a "series of criminal violations [that] arose out of the same act or transaction" such as is sometimes the case during a "criminal spree"); United States v. Washington, 898 F.2d 439, 442 (5th Cir. 1990) (holding that defendant's robberies of same store, and same store clerk, twice in the course of several hours "were separate criminal episodes because [the defendant] committed the first [robbery], completed it, and escaped; then, after a few hours of no criminal activity, . . . returned to commit the second crime"). Nelson's arguments do not call into question the legality of his sentence.

3. Ineffective Assistance of Counsel

Nelson complains that his lawyer failed to provide effective assistance because he did not raise any of the foregoing arguments prior to Nelson's plea of guilty or the pronouncement of Nelson's sentence. First, Nelson did not have the right to collaterally attack his prior convictions in the context of his sentencing hearing any more than he does now. See Custis v. United States, 511 U.S. 485 (1994). It was not ineffective assistance for his attorney to refrain from pressing this futile argument. Similarly, because there was nothing unconstitutional about either the government's prosecution of Nelson under § 922(g) or the jury's impanelment, nor anything

illegal in the Court's decision to count the four episodes of sexual assault and misconduct as four convictions, Nelson cannot satisfy Strickland's ineffective assistance of counsel standard. Strickland v. Washington, 466 U.S. 668, 669 (1984) (requiring a showing that counsel's performance fell below a standard of objective reasonableness and that, but for that inadequate performance, the outcome of the proceedings would have been different).

Conclusion

Having considered the arguments raised in Nelson's filings and having found them baseless, I **RECOMMEND** that the Court **DENY** his motion for relief.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: August 3, 2001

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 00-CR-6-ALL

USA v. NELSON Filed: 01/05/00
Dkt# in other court: None
Case Assigned to: JUDGE GENE CARTER
FRANKLYN R NELSON (1) JAMES S. HEWES, ESQ.
aka [term 06/09/00]
FRANKLIN NELSON [COR LD NTC cja]
defendant 80 EXCHANGE STREET
[term 06/09/00] SUITE 24, PORTLAND, ME 04101 - 773-4000

FRANKLYN R NELSON
[COR LD NTC pse] [PRO SE]
Reg. No. 03899-036, USP LEWISBURG, LEWISBURG, PA 17837

Pending Counts: Disposition

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC., : Felon in Possession of a Firearm - Dft sentenced to 180 mos. custody on Count One. REMANDED to custody of USMS. Supervised Release 60 mos. on Count One with special conditions. Special Assessment $100; Fine waived. (1)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

U. S. Attorneys:

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